TAN BOK YENG v. PUBLIC PROSECUTOR

[A.Cr.J. (Sharma J.) February 1, 1972]

[Ipoh — Criminal Appeal No. 3 of 1972]

Criminal Law and Procedure — Appeal — Sentence — Binding over — Criminal Procedure Code (F.M.S. Cap. 6) s. 294.

Penal Code (F.M.S. Cap. 45), ss. 392, 34 — Punishment for robbery.

The appellant and one Koh Hong Nam were jointly charged in the sessions court under section 392 of the Penal Code read with section 34 thereof. The appellant was the first accused in that case and Koh Hong Nam the second accused. The second accused pleaded guilty to the charge and was bound over under section 294 of the Criminal Procedure Code. The first accused claimed trial and after being found guilty was sentenced to one year's imprisonment.

In his grounds of decision the learned president said "From the prosecution evidence I was in no doubt that the first accused was the leader of the two robbers", and again he went on to say "in imposing the sentence on the first accused I took into consideration that he is twenty-five years old and he was the person who must have persuaded the second accused to commit the crime with him." It was alleged that these passages were mere conjectures.

The appeal was only against sentence and the only substantial ground of appeal was that the learned president in dealing with the two accused, applied two totally different standards.

Held, dismissing the appeal: (1) the records against the second accused were to be called for with a view to revision and the decision of the learned president varied if necessary;

(2) although the appeal was restricted to sentence alone, there could be no doubt of the guilt of the appellant, and therefore the conviction was not based on mere conjectures.

Per Sharma J.: "...I am quite aware that the law does provide for a lesser sentence or no sentence at all imposed upon persons of young age. There is however, emerged in recent years in our society certain species of crimes which the alacrity of mind and body, the dare, dash and defiance of the youth alone is capable of performing and producing. Law cannot, in my view, remain merely a static and a meaninglessly passive, if ornamental and an orthodox instrument of justice, ineffective in its result and application. The social needs of the times have to be met and effectively met. It is not merely the correction of the offender which is the prime object of punishment. The considerations of public interest have also to be borne in mind. In certain types of offences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society." (*Post* p. 215 C *I*).

MAGISTRATE'S CRIMINAL APPEAL.

Jagdis Singh for the appellant.

Haidar bin Mohamed Noor (Deputy Public Prosecutor) for the respondent.

Sharma J. (delivering oral judgment): The appellant and one Koh Hong Nam were jointly charged in the sessions court under section 392 of the Penal Code read with section 34 thereof. The appellant was the first accused in that case and Koh Hong Nam, the second accused. The second accused pleaded guilty to the charge and was bound over under section 294 of the Criminal Procedure Code. The first accused claimed trial and was sentenced to one year's imprisonment.

The present appeal is only against sentence and the only substantial ground of appeal is that the learned president in dealing with the two accused applied two totally different standards. I am inclined to agree with that submission of the learned counsel for the appellant. The learned president may have acted wrongly, and probably did, in only binding over the second accused when the part played by both the accused was ostensibly and in fact almost identical in design and execution. The argument however is somewhat fallacious, even mischievous. If one mistake is made or a wrong inflicted, it cannot be an excuse or justification for the making or the infliction of another mistake or wrong. I have already instructed the senior assistant registrar to call for the records against the second accused with a view to revision so that any sense of grievance which the appellant or any member of the public may have against the decision of the learned president may be redressed and that decision varied if it is found necessary.

The appellant was a resident of Klang. He came to Ipoh on the 8th August, 1971 and the very next day at 8 a.m. he and the other accused committed the theft of a motor-cycle. They then used the same motor-cycle for the commission of the robbery which was the subject matter of the charge before the learned president. This robbery was committed at 10.35 a.m.

PW1 was an office boy employed by the Malayan Frozen Foods Ltd. and was sent to the bank by his employers to cash a cheque for $6,000. He duly cashed the cheque, put $4,000 in his trouser pocket and the balance of $2,000, which was in $10 notes, in a plastic bag which he held in his hand while returning on a bicycle to the place of his employment.

The prosecution version of the incident was that the police were already aware of the plan by the two accused to commit the robbery and that they had consequently laid an ambush. The appellant was the rider of the motor-cycle. Both the accused followed PW1 and at Jalan Laxamana, the second accused kicked him while he was in the act of cycling, the motor-cycle having been brought close to the bicycle. PW1 fell down and was punched by the second accused. The plastic bag containing $2,000 was snatched away from him and both the accused tried to disappear, little knowing that the police were following them. Ultimately the police arrested them and recovered the sum of $2,000.

It was a robbery which seems to have been very well planned and very well executed and had it not been for the prior information the police already had about it, there would perhaps have been no possibility of the recovery of the money or even detection of this crime, a crime which was committed in broad daylight.

My attention has been drawn by the learned counsel for the appellant to certain passages in the grounds of decision of the learned president which it is said are mere conjectures. I am in full agreement with the learned counsel that a conviction cannot be based on mere conjectures or suppositions alone. The learned president says in his grounds of decision:

"From the prosecution evidence I was in no doubt that the first accused was the leader of the two robbers."

and again he went on to say:

"In imposing the sentence on the first accused I took into consideration that he is 25 years old and he was the person who must have persuaded the second accused to commit the crime with him."

No inference should be drawn on mere surmises. It may in some cases be difficult to draw a line between suspicion and proof. Care must, however, be taken that the decision of the court does not rest upon suspicion. There could be no doubt of the guilt of the appellant in this case. The appeal itself is restricted to sentence alone.

The second accused was 20 years of age while the appellant was 25 years at the date of the commission of the crime. I am quite aware that the law does provide for a lesser sentence or no sentence at all imposed upon persons of young age. There has, however, emerged in recent years in our society certain species of crimes which the alacrity of mind and body, the dare, dash and defiance of the youth alone is capable of performing and producing. Law cannot, in my view, remain merely a static and a meaninglessly passive, if ornamental and an orthodox instrument of justice, ineffective in its results and application. The social needs of the times have to be met and effectively met. It is not merely the correction of the offender which is the prime object of punishment. The considerations of public interest have also to be borne in mind. In certain types of offences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society.

In my view the learned president was far too lenient in sentencing the appellant to only one year's imprisonment. The appeal is dismissed but the sentence is enhanced to two years.

Appeal dismissed.
Sentence enhanced.

Solicitor: *Sandu.*

PUBLIC PROSECUTOR v. CHEAH CHOOI CHUAN

[R.Cr.J. (Chang Min Tat J.) February 14, 1972]

[Penang — Criminal Revision No. 3 of 1972]

Criminal Law and Procedure — Revision — Plea of guilty after challenge to cut off cockerel's head — Effect of in criminal proceedings.

Oaths and Affirmations — Challenge to cut off cockerel's head — Whether challenge permitted in criminal proceedings — Oaths and Affirmations Ordinance 1949, s. 9.

An accused person was allowed to plead guilty to a charge after the identifier had accepted his challenge to cut off a cockerel's head on the challenge issued by him. The summary execution of a cockerel took place in the compound of a court.

This case was called up on revision to determine whether the order made by the learned president of the sessions court should be revised.

Held: by section 9 of the Oaths and Affirmations Ordinance, 1949, this form of oath was limited to judicial proceedings of a civil nature. Thus, there was no justification for permitting this challenge to be taken in criminal proceedings. Therefore the entire proceedings in the court below became a complete nullity. The conviction must be quashed and the sentence set aside. There should be a retrial before another president.

Abu Talib bin Othman (Legal Adviser, Penang) for the Public Prosecutor.

Respondent in person.

Chang Min Tat J. (delivering oral judgment): My attention was drawn to this case by the prominence given to it by the newspapers. If it is felt that the prominence was undue it is only in proportion to the unusualness of the proceedings in which an accused person was allowed to plead guilty to the charge after the identifier had accepted his challenge to cut off a cockerel's head on the challenge issued by him.

In passing, I would remark that the prominence was partly due to the summary execution of a cockerel in the compound of a court.

I called up this case therefore on revision and this morning after hearing the learned Legal Adviser who was good enough to attend court I invited the accused to address me on whether I should not revise the order made by the learned president of the sessions court. He said in answer to me that he did not commit the offence. This must therefore reinforce the suspicion that I had on reading the article in the newspapers that his plea of guilty subsequent to the cutting of the cockerel's head was made with the mental reservation that if the complainant was prepared to perjure her soul or to suffer whatever torments in the next world she believed she would be subject to for perjury, he would be prepared to go to jail. It is a cardinal principle that any plea of guilty must be completely unreserved, unqualified and unequivocal. The circumstances of this case must persuade me that there was no such plea and even though the record showed that subsequent to the execution of the cockerel the accused was re-charged and he pleaded guilty thereto, the plea was nevertheless not of that kind that should have been accepted by any court which purports to administer justice in any proper sense of it.